



The State of New Hampshire
Department of Environmental Services
Water Council

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STATE OF NEW HAMPSHIRE

WATER COUNCIL

Docket No. 04-14 WC

**Appeal of Mark and Marianne Bonaiuto
In Re: Wetlands File No. 2004-00355**

Decision & Order on Notice of Appeal

Background

On May 12, 2004, the Department of Environmental Services ("DES") approved a Shoreland Waiver application by Daniel Osborn ("the Applicant") to retain an expansion to a nonconforming dwelling on Rock Island in Atkinson, on Big Island Pond ("the Project").

Appeals of DES decisions, in which the NH Water Council has jurisdiction, must be filed within thirty (30) days of the date the decision being appealed was issued as per NH Code of Administrative Rules Part Env-WC 203.02.

On July 1, 2004, Mark and Marianne Bonaiuto ("the Appellants") filed a Notice of Appeal ("the Appeal") with the NH Water Council ("the Council"). The subject of the Appeal was the DES decision to grant Shoreland Waiver No. 2004-00355 to the Applicant. In its filing, the Appellants moved that the Council waive the time limit set forth by Env-WC 203.02. The Appellants argued that DES staff gave the Appellant incorrect information as to the proper appeals process that needed to be followed if they choose to file an appeal of the DES decision. The Appellants argued that DES advised that an appeal of the DES decision could be initiated by filing an appeal with the DES Wetlands Bureau Administrator within 20 days of the decision being appealed. The Appellants argued that it complied with the DES advice by faxing an appeal to the DES Wetlands Bureau Administrator on June 1, 2004.

On June 10, 2004, DES informed the Appellants by letter that "...appeals of waivers or variances under RSA 438-B, the Comprehensive Shoreland Protection Act ('CSPA') must be submitted directly to the Water Council in accordance with Rule Env-WC 200." The Appellants subsequently filed the July 1, 2004 Notice of Appeal with the Council. On July 13, 2004, DES filed a letter in this Appeal requesting that the Council waive Env-WC 200 acknowledging that Appellants filed on a timely basis in accordance with DES' advice.

Appellants allege they are abutting landowners. In their Appeal, they raise concerns about the fact that the new construction will add volume use on an older septic system; will cause erosion; and will cause additional runoff into the pond.

Discussion / Conclusion

NH Code of Administrative Rules Part Env-WC 203.30 allows the Council to waive, for good cause, the application of any part of Env-WC 200 not mandated or required by any New Hampshire statute. The Council finds in this case good cause exists to waive the time limit set forth by Env-WC 203.02. Whether the Council has authority to waive this deadline is not decided in this Appeal.

Upon careful examination and consideration of the Notice of Appeal, the Council finds that the Appellants lacks standing to bring this Appeal and has failed to identify or demonstrate that a direct injury or particular harm either has or will occur to it as a result of the DES decision on appeal. *See Appeal of Richards*, 134 NH 148, 156 (1991); and *Week's Restaurant Corp. v. Dover*, 119 NH 541 (1979). The Appellants alleged that the harm it would suffer was general, such as the fact that the new construction will add volume use on an older septic system; will cause erosion; and will cause additional runoff into the pond. The Appellants allege that all of these harms will adversely impact the pond.

However, these “harms” are general harms that anyone who lives around the pond or recreates on it are subject to. Under New Hampshire law, DES is charged with protecting the ponds of New Hampshire and does so through its permitting process. Because the types of harm alleged by Appellants are not the particularized injury that directly affect the appellant which are required for standing. Based on this lack of standing, the Council denies the Appeal. *See Appeal of the Londonderry Neighborhood Coalition*, 145 NH 201 (2000).

Further, as already stated, the project is located on Rock Island in Atkinson on Big Island Pond. According to an area map contained in the Notice of Appeal, Rock Island is a 0.26 AC island. The Applicants argue in its July 13, 2004 Motion to Dismiss that the Appellants are not abutters to the project, nor are they in close proximity to the project. The Appellants did not object to the Applicants Motion to Dismiss. The Council finds that the Appellants failed in its Notice of Appeal to establish that they are in fact abutters to the project.

Order

Notice of Appeal is **DISMISSED**.

Reconsideration

Pursuant to Env-WC 203.29(a), any person whose rights might be directly affected by this decision may file a motion for rehearing within 30 days of the date of this decision. The motion must contain the information specified in Env-WC 203.29(b). Copies of any motion for rehearing shall also be sent or delivered to all other parties of record. Pursuant to Env-WC 203.29(e), this decision shall become final if no motion for rehearing is filed within 30 days.

So Ordered for the Council by:


Michael Sciatani, Appeals Clerk

October 14, 2004